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No. 88-1144

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

PENTHOUSE INTERNATIONAL, LTD. and
BOARDWALK PROPERTIES, INC.

Petitioners,

v.

DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION,
MELROD, REDMAN & GARTLAN, P.C., AND
QUEEN CITY SAVINGS & LOAN ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION AND MELROD, REDMAN & GARTLAN, P.C., IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in this diversity case when it undertook a careful review of a voluminous trial record, determined, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, that material findings of fact by the district court were "clearly erroneous" and applied unexceptional doctrines of New Jersey law to undisputed facts.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988
No. 88-1144

PENTHOUSE INTERNATIONAL, LTD. and
BOARDWALK PROPERTIES, INC.,

Petitioners,

-against-

DOMINION FEDERAL SAVINGS & LOAN
ASSOCIATION, MELROD, REDMAN &
GARTLAN, P.C., and QUEEN CITY
SAVINGS & LOAN ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
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BRIEF FOR RESPONDENTS DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION AND MELROD, REDMAN & GARTLAN, P.C., IN OPPOSITION

Respondents Dominion Federal Savings & Loan Association ("Dominion") and Melrod, Redman & Gartlan, P.C. (the "Melrod firm") submit this joint brief in opposition to the petition for a writ of certiorari filed by petitioners Penthouse International, Ltd. and Boardwalk Properties, Inc. (collectively "Penthouse").

STATEMENT OF THE CASE

This case is a routine diversity suit for breach of contract, governed by New Jersey law. It attracted the media attention stressed by petitioners only because the district court, relying on discredited precedent, imposed a hugely inflated "lost profits" damage award.[1/] It caused a stir in the lending industry because the district court, venting indignation and anger over what it believed to be an intentional breach of a business contract, expressed its findings in unusually harsh language (*see, e.g.*, A. 64a, 77a, 80a, 81a, 88a).[2/] And it drew an *amicus curiae* brief from the Federal Home Loan Bank Board favoring respondents' position only because the district court's holding that the lead lender could waive Penthouse's compliance with several material pre-closing conditions threatened to change radically the ground rules for syndicated lending in the United States.

Although the petition for certiorari (pp. 12–14) stresses the media attention given to the proceedings below, it does not rely upon any of the normal factors warranting certiorari: it presents no issue of federal law; it cites no conflict among the courts of appeals; it suggests no important question of unsettled law of any kind. Rather, the petition invokes only this Court's "supervisory authority" over the lower federal courts (Cert. Pet. at 12), merely to correct an asserted oversight in the application of New Jersey law and to reconsider fact findings determined to have been clearly erroneous.

Even if there were errors in either respect, this would not be an occasion for the exercise of this Court's "supervisory power." In

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1/ As the court of appeals observed (Pet., App. 45a), the district court's award of lost future profits — by far the lion's share of its $128.6 million judgment — was erroneously premised on the Second Circuit's 1976 decision in *Perma Research & Development Co.* v. *Singer Co.*, 542 F.2d 111 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976), decided under New York law. That case enunciated a rule of damages that was rejected by the New York Court of Appeals in *Kenford Co.* v. *County of Erie*, 67 N.Y.2d 257, 493 N.E.2d 234, 502 N.Y.S.2d 131 (1986).

2/ Citations preceded by the prefix "A. ____" refer to pages of the appendix to the Petition for a Writ of Certiorari; citations bearing the prefix "J.A. ____" refer to pages of the joint appendix in the court of appeals.

any event, there was no misapplication of New Jersey law, and the court of appeals, far from trampling upon the district court's domain, stayed well within the "clearly erroneous" standard of Rule 52(a), F.R. Civ. P. The court of appeals carefully avoided resolving the credibility questions which had so disturbed the district court. 3/ Instead, it undertook a careful review of the trial record and found clear error on the basis of unambiguous documentary evidence and facts in the record on which there was no dispute. In short, applying settled principles of New Jersey law, the court of appeals held that Penthouse had failed to prove its case.

* * *

As the petition for certiorari recognizes (at 14–15) there were two separate grounds for the court of appeals' holding that the anticipatory breach finding was "clearly erroneous": (1) that Penthouse had failed to meet its burden of proving its ability to satisfy essential preconditions embodied in the written contract (A. 45a); and (2) that almost all of the acts and utterances of Dominion and its lawyers (the Melrod firm) relied upon by the district court as evidence of "anticipatory breach" took place after the contractual loan commitment had expired (A. 33a). The court of appeals made clear that these were two separate and independent grounds for reversal (A. 45a). We therefore turn to the record facts relevant to those two separate grounds.

3/ Even the first-time reader of the district court's extraordinary opinion (A. 67a–91a) and supplementary order (A. 62a–64a) must be struck by the extent to which the district judge was driven by his personal reaction to the witness-stand demeanor of Melrod partner Philip Gorelick and, to a lesser extent, Dominion's Chairman William Walde. The district court's upset was first revealed in the remarkable "robing room incident" recounted in the court of appeals' opinion (A. 22a) — in which the district court *ex parte* expressed its view that Gorelick was lying, while he was still on the stand; it emerged full-blown in the district judge's graphic description of Gorelick's subsequent discomfort under cross-examination (A. 77a n.1); and it culminated in his *sua sponte* imposition of the full $128.6 million damage award upon the Melrod firm, even though Penthouse had sought a judgment of only $1.2 million against that firm (A. 62a–64a). Although they were not essential to the grounds for its reversal, the court of appeals felt constrained to express its strong disapproval of these excesses by the district court (A. 54a).

The Penthouse Loan Commitment

The statement of facts in the petition for certiorari (at 2-9) glosses over the terms of the basic written contract which the district court held that Dominion breached. That contract was the loan commitment letter between Penthouse and respondent Queen City Savings & Loan Association ("Queen City"), dated June 20, 1983 (J.A. 85-96). Pursuant to the loan commitment, Queen City agreed to be the "Lender" on a secured $97 million construction loan, but obligated itself to lend only $7 million — less than 8% of the total loan. Queen City's $97 million commitment was expressly conditioned on obtaining "other lenders" to participate for the remaining $90 million, through Queen City as "lead institution." [4/]

When Dominion became the last participant on November 21, 1983, the documents it signed expressly incorporated the Penthouse-Queen City loan commitment as the essence of Dominion's contractual obligation (A. 9a).

The Written Pre-Closing Conditions

The loan commitment to which Dominion agreed enumerated twenty "Conditions Prior to Loan Closing." Thus, prior to the lenders having any obligation to close, Penthouse was required, *inter alia*, to obtain clean title on certain leaseholds, so as to be able to deliver the promised first mortgage liens (A. 6a); it was obligated to arrange with the New Jersey Casino Control Commission for a license (or an acceptable alternative arrangement) permitting the operation of

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4 Although Queen City is named as a respondent in the petition for certiorari, Penthouse did not sue Queen City. It became a party when Dominion asserted a third-party claim against it for breach of its duties to Dominion. Queen City then counterclaimed against Dominion. The district court dismissed the third-party claim, but awarded Queen City $7.6 million on its counterclaim. Because the court of appeals reversed both Penthouse's judgment against Dominion and Queen city's judgment on its counterclaim, it also affirmed the dismissal of Dominion's third-party indemnification claim. Accordingly, solely as a protective measure, Dominion is filing a conditional cross-petition for certiorari seeking review of the dismissal of its third-party claim against Queen City.

a casino on the premises (A. 9a–10a); and it had to have in place final plans and specifications for its proposed casino–hotel, contracts with major trade contractors and utilities, and a final budget detailing how the borrowed funds would be spent (A. 6a–7a).

There was nothing remarkable about these pre–closing conditions — they were designed to give the lenders assurance that they would have a clean, insurable first lien on a casino–hotel licensed to operate, and that the $97 million loan would be sufficient for Penthouse to complete the construction. Nevertheless, as the court of appeals recognized, there was no evidence in the voluminous trial record that Penthouse ever met, or was even close to meeting, these material pre–closing conditions (A. 45a).

The most that appears in the record on the clean title condition is that Penthouse had recognized the necessity of obtaining amendments to certain leases in order to be in a position to deliver clean title, and had asked its New Jersey lawyer to make contact with a representative of the lessor (A. 42a–44a). Likewise, on the casino licensing condition, the record shows only that another New Jersey lawyer for Penthouse had begun discussions with the staff of the New Jersey Casino Control Commission, which had resulted only in a "rough outline" of what the lawyer thought "might be acceptable" to the Commission (A. 44a). And with respect to the requirements for final plans and specifications, trade contracts and utilities, Penthouse did not even attempt to prove its compliance; rather, it relied upon oral statements in January 1984 by John Lipari, Queen City's lawyer, purporting to accept non–compliance with those conditions — what Penthouse now calls "substitute performance," but the district court held to have been "waivers" of those conditions (A. 85a–86a). There was no evidence that Dominion was ever consulted about, much less consented to, such "waivers." Nor was there any evidence, as the court of appeals held, that Queen City was given authority to bind Dominion to such "waivers."

Dominion's Alleged "Anticipatory Breach"

The district court premised its finding that Dominion was guilty of "anticipatory breach" of the loan commitment on the following actions and utterances of Dominion and its attorney, Philip Gorelick of the Melrod firm: (1) that Gorelick had insisted on re-doing the loan documentation and on obtaining proposed lease amendments that went beyond what was required to deliver clear title; (2) that Dominion had demanded that a hotel management agreement be in place prior to closing; (3) that Dominion, through Gorelick, had urged that Penthouse hire a construction company to perform a cost evaluation; and (4) that Dominion had demanded that it replace Queen City as lead lender.

All but the first of these actions took place after March 1, 1984 — and the court of appeals held that the district court erred by taking them into account in determining anticipatory breach because the loan commitment had expired on that date (A. 32a). 5/ The court of appeals' holding that the written loan commitment expired on March 1 was, in turn, based upon the following documentary evidence and undisputed facts in the record:

(a) On its face, the loan commitment was an agreement that its drafters did not intend to be open-ended; rather, it contained a definite expiration date that could not be extended except in writing (A. 28a).

(b) The only writings purporting to extend the expiration date were two letters dated November 21, 1983 which extended that date to December 1, 1983, but also set a closing date of no later than March 1, 1984 (A. 27a).

5/ With regard to the remaining ground for the "anticipatory breach" holding — that Gorelick had insisted on re-doing the closing documents and allegedly required unnecessary amendments to the lease — the court of appeals reviewed the entire record and concluded that the district court had "clearly erred" in holding that such requests gave rise to an anticipatory breach under New Jersey law (A. 34a-36a).

(c) In paragraph 7 of its complaint, Penthouse had alleged *as fact* that

> "[t]he Loan Commitment was scheduled by its terms, to remain in effect for 120 days after issuance, and *was subsequently extended to March 1, 1984.*" (Emphasis added.)

(d) The district court had itself implicitly found a March 1, 1984 deadline when it concluded that the title problems "could have been resolved in time to close the deal before March 1, 1984" (A. 74a). (Although not expressly cited by the court of appeals, the district court's finding of a definite expiration date was also implicit in its conclusion that Dominion had determined "either . . . to stall the closing *until the loan expired* and then withdraw its commitment, or breach its agreement." (A. 86a; emphasis added.))

The Opinions Below

1. *Penthouse's Ability to Perform*

The district court's basic findings on this issue were as follows:

> . . . at the time of the preclosing meeting [Feb. 9, 1984], all of the conditions precedent had been met, waived, or were in a position to have been met by the date set for closing the loan. . . . [T]here were some minor title problems which needed to be straightened out . . . [but t]here was no reason to believe this would not or could not be resolved prior to the actual closing. [A. 85a.]

The court of appeals, noting that Penthouse "bore the burden of establishing its willingness and ability to perform all of the obligations under the agreement," concluded that these findings were clearly erroneous (A. 36a–45a). Considering the *undisputed* evidence concerning Penthouse's problems in obtaining insurable title (A. 43a–44a), the court of appeals was

> compelled to conclude that the district court clearly erred when it characterized these matters as being "minor." Unless

these problems were resolved, they absolutely would have prevented Penthouse from delivering the title required in the commitment. Likewise, unless the Helmsley lease was modified, Penthouse could not certify that there were "no violations" of that lease. Thus, in view of the gravity of these problems, Penthouse knew that they had to be resolved by the closing date. We therefore conclude that they were not "minor." [A. 42a–43a]

Similarly, with regard to Penthouse's inability to obtain a casino license, the court of appeals wrote:

> With regard to the [district] court's finding concerning the status of the alternative licensing arrangements condition, we note that the district court overlooked the fact that this was a *preclosing* condition. Because the court found that these arrangements could have been made *after* closing, it is clear that Penthouse did not carry its burden to demonstrate its ability to perform this condition *before* closing. In addition, we observe that record evidence does not support the court's finding that these arrangements were "easily within reach.". . . Therefore, due to the tentative status of the proposed alternative arrangements and the absence of an actual agreement, we are convinced that the district court also erred in this regard. [A. 44a]

As the court of appeals clearly understood (A. 38a), the district court's finding that Penthouse did not have to prove its ability to comply with other pre-closing conditions (*i.e.*, final plans and specifications, trade and utility agreements, and a final budget), because they were "waived" by Queen City, was integral to its determination that Penthouse had met its burden of proof. The court of appeals concluded that the district court's "waiver" finding was also clearly erroneous, because

> it is clear that Queen City was not authorized expressly or inferentially in the commitment or the participation agreement to modify the terms of the commitment by waiving Penthouse's full compliance with preclosing conditions. [A. 40a]

In reaching this result, the court of appeals did not rely on disputed testimony requiring an assessment of credibility — because

Penthouse presented no testimony on Queen City's authority to waive pre-closing conditions. Rather, it construed the clear language of contract documents, including the following:

(a) The documents signed by Dominion incorporated the terms and conditions of both the loan commitment and a separate participation agreement among the lenders, requiring the court to read the documents together as one instrument under New Jersey law. (A. 39a.) [6/]

(b) Nowhere did the loan commitment or participation agreement provide that Queen City was authorized by the participating lenders to waive Penthouse's compliance with any of the preclosing conditions (A. 39a).

(c) While the loan commitment provided that

> [a]ll title questions and all other legal matters relating to or arising out of the Loan shall be subject in all respects to the approval of the Lender's counsel. . . and the decision of the Lender's counsel as to whether all conditions of the commitment have been met shall be final,

it also provided that

> [l]ender's obligation to close the loan is contingent upon the satisfaction of each of [the pre-closing] conditions. [A. 39a]

Reading these provisions together, the court of appeals concluded that

> . . . although Queen City had the final word on whether the preclosing conditions had been satisfied, Penthouse nevertheless was required to satisfy each of the preclosing conditions. Thus, Queen City was granted essentially administrative authority to oversee the manner in which the preclosing conditions were satisfied, but it was not empowered to waive Penthouse's compliance with the preclosing conditions. (A. 39a–40a)

6/ *Schlein* v. *Gairoard*, 127 N.J.L. 358, 360, 22 A.2d 539, 540–41 (1941); *see Schlossman's, Inc.* v. *Radcliffe*, 3 N.J. 430, 435, 70 A.2d 493, 495 (1950).

(d) The participation agreement expressly provided that its terms could not be modified except by an agreement in writing.

(e) The participation agreement authorized Queen City to act on behalf of the lenders in the capacity of an independent contractor, not as an agent. Under New Jersey law, therefore, Queen City had discretionary power as to the means and manner of contractual performance, but it was not empowered to make material changes that rendered the participants less secure (A. 40a). 7/

Penthouse itself recognizes that such judicial construction of unambiguous contract documents is appropriate for an appellate court (Cert. Pet. at 23). Beyond the contractual language, there was no evidence in the record to suggest any implied grant of power to Queen City to waive the pre-closing conditions. Indeed, all the evidence was to the contrary (A. 41a).

2. *Dominion's Alleged "Anticipatory Breach"*

The court of appeals had no difficulty in determining, as a matter of law, that the loan commitment expired on March 1, 1984. Penthouse had so alleged in its complaint (¶ 7), and -- contrary to Penthouse's assertion (Cert. Pet. at 20) that the district court made no findings to this effect -- a March 1 expiration was implicit in at least two of the district court's own findings (*see* p. 7 *supra*). Beyond that, the written agreements permitted no other conclusion (*see* pp. 6-7 *supra*) and there was evidence in the record that Dominion, as well as other participants, believed in 1984 that their commitments had expired on March 1 (J.A. 2316-20). The court of appeals thus concluded that

> [t]he parties bargained for a loan commitment that remained open only for a stated duration and we are not at liberty to construe that agreement in a manner inconsistent with its clear language. [A. 30a.]

7/ *See, e.g., Errickson* v. *F.W. Schwiers, Jr. Co.*, 108 N.J.L. 481, 483, 158 A. 482, 483 (1932); Restatement (Second) of Agency § 51 comment c (2d ed. 1979).

Applying settled New Jersey law in light of the March 1 expiration date, the court of appeals held that Dominion's conduct after March 1, 1984 was not relevant to the determination of whether an anticipatory breach had occurred. And in a determination the petition does not challenge, the court of appeals concluded that the district court "clearly erred" when it found an anticipatory breach based on Dominion's conduct prior to that date (A. 35a–36a).

Because it concluded that the district court's findings concerning *both* Penthouse's ability to perform *and* Dominion's anticipatory breach were "clearly erroneous," the court of appeals unanimously reversed the judgment against Dominion. 8/

REASONS FOR DENYING THE WRIT

I.

The Decision Of The Court Below Presents No Question of General Importance Warranting Review By This Court

As noted at the outset, Penthouse's petition for certiorari does not raise any federal question, or assert a conflict among the circuits, or seek resolution of any unsettled issue of law. Rather, Penthouse invokes only this Court's "supervisory power," claiming that it should be utilized simply to correct an asserted misapplication of settled New Jersey law and alleged appellate fact-finding in violation of Rule 52(a), F.R. Civ. P. But, as this Court has affirmed, "[t]he supervisory power is applied with some caution," *United States* v. *Payner*, 447 U.S. 727, 734 (1980), and is used only rarely. It is used, for example, to establish and maintain "civilized standards of procedure and evidence" in criminal cases, *McNabb* v. *United States*, 318 U.S. 332, 340 (1943), or "in the determination of the procedures to be employed by

8/ The judgment against the Melrod firm was also reversed. Among other things, the court concluded that there was no evidentiary basis for the fraud claim against the Melrod firm (A. 50a–54a) and that the finding of "perjury" by Gorelick was both unnecessary and not, as required, based upon "clear and convincing proof" (A. 54a). Penthouse does not seek review of this part of the court of appeals' decision.

courts to enforce their orders, a subject that directly concerns the functioning of the judiciary." *Young* v. *United States ex. rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2138 (1987). Penthouse cites no authority even hinting that it is appropriate for this Court to supervise the circuit courts' application of settled state contract law, or to review every asserted transgression of Rule 52(a).

Although Penthouse argues that the court of appeals purported to "fashion general commercial law" in violation of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), in fact the petition presents nothing more than a claimed failure to consider one unremarkable line of New Jersey authority on the "time of the essence" doctrine (Cert. Pet. at 14–16). Even were that an error under New Jersey law (which it was not, see pp. 13-14 *infra*), it would be no occasion for exercise of "supervisory power" by this Court. That much is obvious simply from comparing this case to *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays–Bas*, 109 S. Ct. 299 (1988), cited by Penthouse, in which this Court summarily remanded to the Fifth Circuit for consideration of a new Texas case decided after the court of appeals decision. Here, there is no claim of any intervening change in New Jersey law since the date of the court of appeals decision. Rather, as Penthouse itself states (Cert. Pet. at 15), the "time of the essence" doctrine allegedly "overlooked" was "fundamental and well–established" in New Jersey years ago.

The petition thus flies in the face of the settled principle that this Court does not sit to review determinations of state law by the courts of appeals. As this Court stated in *Haring* v. *Procise*, 462 U.S. 306, 314 n.8 (1983), "standing alone, a challenge to state–law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review."

Judged by these familiar standards, the petition for certiorari presents no problem of applying state law that requires review by this Court.

II.
The Court of Appeals Correctly Applied New Jersey Law in Any Event

Penthouse does not claim that the court of appeals ignored New Jersey law in reaching its determinations. On the contrary, the Second Circuit cited unimpeachable New Jersey authority throughout its opinion (*e.g.*, A. 27a–28a, 31a, 32a, 36a, 39a) and applied principles of contract law that are unassailable in New Jersey and probably good law in every state (*e.g.*, A. 27a, 31a, 32a, 37a).

Penthouse's sole quarrel with the court of appeals' application of New Jersey law is its claim that the court's holding that the commitment expired on March 1, 1984 overlooked the "time of the essence" rule enunciated in *Selective Builders, Inc.* v. *Hudson City Savings Bank*, 137 N.J. Super. 500, 349 A.2d 564 (N.J. Super. Ct. Ch. Div. 1975), and other cases. The contention is without substance.

To begin with, this Court should not even consider the "time of essence" argument now advanced by Penthouse because it was not asserted in the court below. *See, e.g., United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Virtue* v. *Creamery Package Manufacturing Co.*, 227 U.S. 8, 38 (1913). Although Penthouse expressly devoted a section of its Second Circuit brief (p. 54) to the March 1 expiration issue, and even cited *Selective Builders* in that connection, contrary to the suggestion in its petition (p. 16), Penthouse made no mention whatever of the "time of the essence" doctrine before the court below. Accordingly, it cannot raise that argument for the first time before this Court.

In any event, the "time of the essence" argument based on *Selective Builders* is without merit. To be sure, *Selective Builders* held that even if time is of the essence, expiration dates in written contracts can be waived or extended. But that same case went on to make clear that any such waiver or extension "must take the form of an agreement founded on valuable consideration" *or* "*a clear, unequivocal* and *decisive* act showing such purpose as to amount to estoppel *in pais*." (137 N.J. Super at 505 n.3, 349 A.2d at 567 n.3; emphasis added.)

In this case, there was no evidence to support a finding that the March 1 deadline date was mutually extended or waived by either an agreement founded on valuable consideration or any "clear, unequivocal and decisive" act by Dominion. On the contrary, Penthouse asserts -- and the district court found — Dominion's acts after March 1 to be evidence of an "unambiguous refusal to close" (A. 88a), not an "unequivocal and decisive" extension of the commitment.

There is another fundamental distinction between this case and *Selective Builders*. There, the borrower had already complied substantially with the preconditions of the contract — indeed, "the project was at least 95% finished at the time in question and thus substantially completed" (*Id.* at 504, 349 A.2d at 567). The New Jersey court thus declined to permit the lender to use the contractual expiration date as the sole excuse for its refusal to perform. Here, the record is clear that, on March 1, 1984, Penthouse was nowhere near ready to close. Moreover, unlike *Selective Builders*, the expiration date was not relied upon as Dominion's excuse for not closing. The court of appeals did not hold, as Penthouse argues (Cert. Pet. at 15), that the instant a written time limit is allowed to expire, "the lenders are thereby relieved of any further legal obligations to the borrower." All it did was to correct the district court's erroneous reliance on acts by Dominion and its counsel after March 1 as supposed evidence of "anticipatory breach." The court of appeals quite understandably declined to consider Dominion's actions after March 1 as evidence of *both* an unequivocal agreement to extend the expiration date *and* an unambiguous refusal to close the loan. No New Jersey case has ever applied the "time of the essence" doctrine in that manner, to whipsaw a contracting party into huge damages for an "anticipatory breach" after the contractual expiration date.

In short, the court of appeals did not err in its application of New Jersey law.

III

The Court of Appeals Scrupulously Observed the Standards of F.R. Civ. P. 52(a)

There was no disregard of the review standards of F.R. Civ. P. 52(a). Although the petition accuses the court of appeals of "deciding factual issues," it can point to no instance in which the appellate court usurped the trial court's prerogative to "judge the credibility of witnesses" [9/] or where it set aside findings of fact except when it found them to be "clearly erroneous." The court of appeals adhered scrupulously to the "clearly erroneous" standard, applying it *in haec verba* no fewer than nine times in its opinion, and carefully explaining each application. The decision below thus stands in sharp contrast to *Dennison Manufacturing Co.* v. *Panduit Corp.*, 475 U.S. 809, 811 (1986), cited by Penthouse, in which this Court vacated and remanded to the court of appeals "for further consideration in light of Rule 52(a)," because the opinion below "did not mention Rule 52(a), did not explicitly apply the clearly-erroneous standard to any of the District Court's findings . . . and did not explain why, if it was of that view, Rule 52(a) had no applicability . . . ."

What Penthouse portrays as impermissible "fact-finding" by the court of appeals was in fact a meticulous review of the documentary and undisputed facts in the record, leading to a "definite and firm conviction that a mistake [was] committed," *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Unlike *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986), cited by Penthouse, where this Court's ruling was based on the fact that "nowhere in its opinion did the court [of appeals] ever mention any of the factual findings of the District Court, much less discuss or analyze them," *id.* at 713, the court of appeals here addressed every aspect of the district court's findings

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9/ Indeed, the court of appeals expressly noted that if the district court found Gorelick's testimony incredible, "that is its prerogative as the trier of the fact . . . ." (A. 54a).

of fact and explained in exhaustive detail exactly why they were erroneous in light of the undisputed evidence in the record. [10/]

What Penthouse complains about was not impermissible "fact-finding" by the court of appeals, but rather its having reached ultimate conclusions from the factual record which differed from the district court's. But that is exactly the proper function of the federal courts of appeals. The district court's intemperate opinion had pushed a viable savings and loan institution to the economic brink simply because it exercised the diligence its depositors and regulators expect of it. And it had jeopardized the career and reputation of a lawyer and his firm precisely because the lawyer had taken seriously his obligation to prevent his client from closing a loan without the legal protection for which it had bargained. The court of appeals redressed these wrongs. Its decision affords no basis for exercise of this Court's supervisory power.

10/ Moreover, this Court's reversal in *Icicle Seafoods* was based on the Ninth Circuit's having erroneously followed "a *de novo* standard of review" (475 U.S. at 713), rather than the Rule 52(a) "clearly erroneous" criterion employed throughout the Second Circuit's opinion here.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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